



LIBRARY

U.S. SUPREME COURT

FILED

SUPREME COURT, U. S.

AUG 13 1968

JAMES F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 53

HAROLD KAUFMAN,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

BRUCE R. JACOB

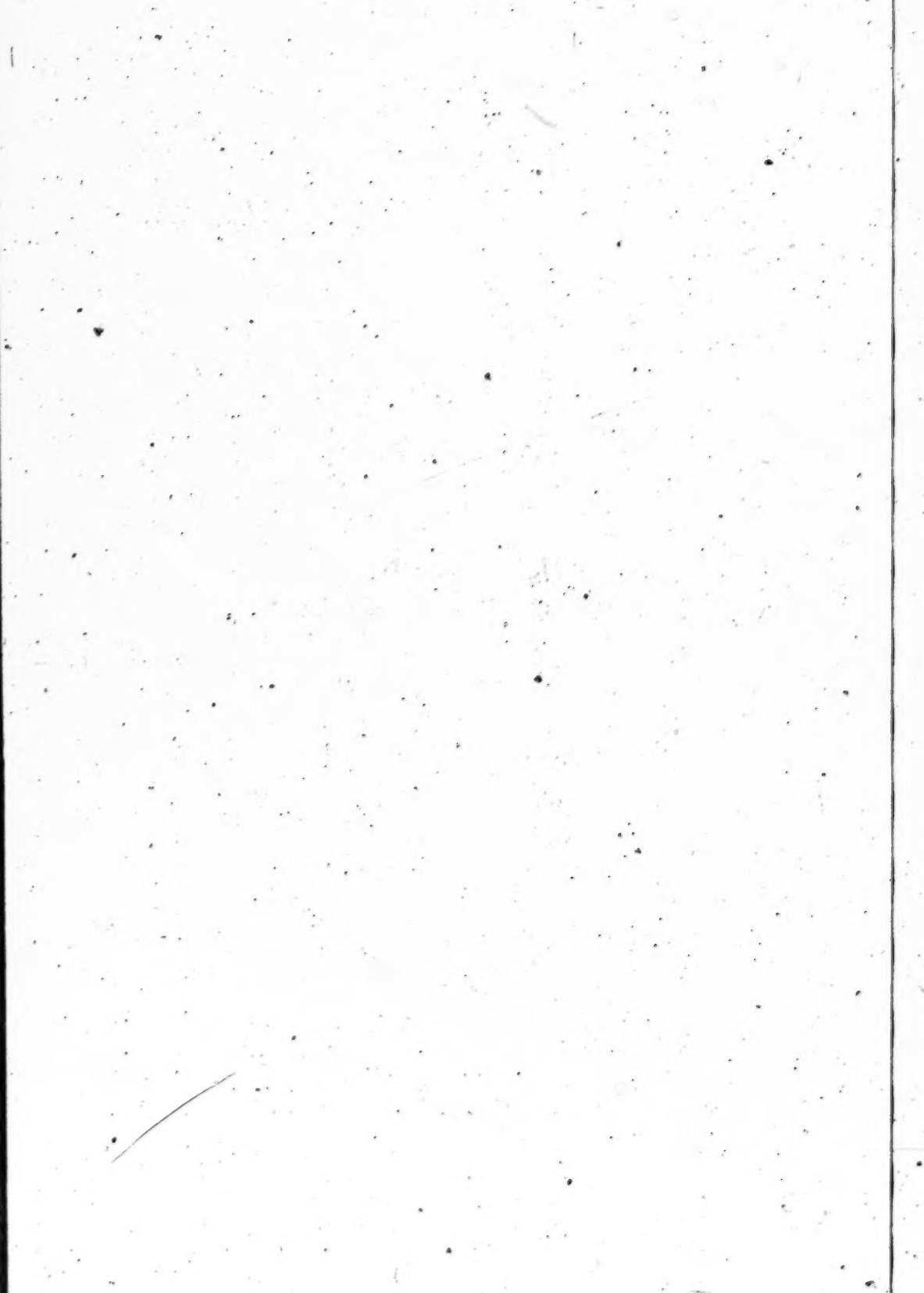
WILLIAM F. C. SKINNER, JR.

Legal Assistance for Inmates Program

Emory University School of Law

Atlanta, Georgia 30322

*Attorneys for Petitioner*



INDEX  
SUBJECT INDEX

	Page
Table of Cases .....	ii
Opinions of Courts Below .....	1
Basis for Jurisdiction .....	2
Constitutional and Statutory Provisions Involved .....	2
Questions Presented .....	3
Introductory Statement .....	3
Statement of the Case and Facts .....	4
Summary of Argument .....	17
 <b>ARGUMENT</b>	
Point 1. A Sentence Based Upon Evidence Obtained Through an Unreasonable Search and Seizure in Violation of the Fourth Amendment Is Subject to Collateral Attack Under 28 U.S.C. § 2255 .....	20
Point 2. Failure of Court of Appeals, in Petitioner's Direct Appeal From His Conviction, to Consider Issue of Improper Search and Seizure Which, on Suggestion of Court of Appeals' Clerk, Was Raised by Court-Appointed Appellate Counsel in Letter to Court of Appeals Subsequent to Oral Argument, Entitled Petitioner to a Consideration of the Search and Seizure Issue in a Proceeding Under 28 U.S.C. § 2255 .....	28
Point 3. Evidence Obtained Through a Warrantless Search of Petitioner's Automobile Sev-	

	Page
eral Hours After His Arrest for a Traffic Violation, in a Garage Located Some Distance From the Place of Arrest and Some Distance From the Place at Which Petitioner Was Being Detained, Was Not Properly Admitted in Evidence Against Petitioner at His Trial for Robbery of a Savings and Loan Association. Further, Evidence Obtained Through a Search of Petitioner's Person at the Police Station After His Arrest on the Traffic Charge Was Not Properly Admitted Against Him .....	35
<b>CONCLUSION</b> .....	49
<b>Certificate of Service</b> .....	50
<b>APPENDICES</b>	
APPENDIX A. Constitutional and Statutory Provisions Involved .....	51
APPENDIX B. Affidavit of Harold Kaufman .....	54
APPENDIX C. Affidavit of Walter E. Diggs, Jr.	56
APPENDIX D. Correspondence From Files of Office of the Clerk, United States Court of Appeals for the Eighth Circuit .....	58

#### TABLE OF CASES

##### SUPREME COURT CASES:

<i>Anders v. California</i> , 386 U.S. 738 (1967) .....	30, 31, 32
<i>Burdeau v. McDowell</i> , 256 U.S. 465 (1961) .....	40
<i>Carafas v. LaVallee</i> , 36 L.W. 4409 (1968) .....	26
<i>Chapman v. California</i> , 386 U.S. 18 (1967) .....	47
<i>Cooper v. California</i> , 386 U.S. 58 (1967) .....	38, 39

## INDEX

iii

	Page
<i>Douglas v. California</i> , 372 U.S. 353 (1963) .....	28
<i>Dykes v. Taylor Implement Manufacturing Co.</i> , 36 L.W. 4436 (1968) .....	37
<i>Ellis v. United States</i> , 356 U.S. 674 (1958) .....	28
<i>Entsminger v. Iowa</i> , 386 U.S. 748 (1967) .....	31, 32
<i>Fahy v. Connecticut</i> , 375 U.S. 85 (1963) .....	47
<i>Fallen v. United States</i> , 378 U.S. 139 (1964) ....	29
<i>Fay v. Noia</i> , 372 U.S. 391 (1963) .....	25
<i>Harris v. United States</i> , 36 L.W. 4195 (1968) ....	39, 40
<i>Henry v. Mississippi</i> , 379 U.S. 443 (1965) .....	26
<i>James v. Louisiana</i> , 382 U.S. 36 (1965) .....	43
<i>Johnson v. United States</i> , 352 U.S. 562 (1957) ..	28
<i>Jones v. United States</i> , 362 U.S. 257 (1960) ....	43, 44
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961) .....	21, 25
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932) .....	28, 41
<i>Preston v. United States</i> , 376 U.S. 364 (1964) ..	15, 36, 39
<i>Sanders v. United States</i> , 373 U.S. 1 (1963) ....	24, 27
<i>Simmons v. United States</i> , 36 L.W. 4227 (1968) ..	44
<i>Stoner v. California</i> , 376 U.S. 483 (1964) .....	37
<i>United States v. Hayman</i> , 342 U.S. 205 (1952) ..	24, 27
<i>Waley v. Johnston</i> , 316 U.S. 101 (1942) .....	25

## FEDERAL CASES:

<i>Armstead v. United States</i> , 318 F.2d 725 (5th Cir. 1963) .....	21
<i>Boruff v. United States</i> , 310 F.2d 918 (5th Cir. 1962) .....	28
<i>California v. Hurst</i> , 325 F.2d 891 (9th Cir., 1963)	27
<i>Coleman v. Maxwell</i> , 351 F.2d 285 (10th Cir., 1965) .....	27
<i>Cox v. United States</i> , 351 F.2d 280 (8th Cir. 1965) .....	20

	Page
<i>DeWelles v. United States</i> , 372 F.2d 67 (7th Cir. 1967) .....	21
<i>Dillion v. Peters</i> , 341 F.2d 337 (10th Cir., 1965) .....	27
<i>Edwards v. United States</i> , 256 F.2d 707 (D.C. Cir. 1958), cert. den., 358 U.S. 847 (1958) ....	21
<i>Eisner v. United States</i> , 351 F.2d 55 (6th Cir. 1965) .....	21
<i>Gaitan v. United States</i> , 317 F.2d 494 (10th Cir. 1963) .....	23
<i>Ganci v. United States</i> , 287 F. 60 (2d Cir. 1923), cert. den. 262 U.S. 755 (1923) .....	46
<i>Gendron v. United States</i> , 340 F.2d 601 (8th Cir. 1965) .....	20
<i>Gilbert v. United States</i> , 307 F.2d 322 (9th Cir. 1962) .....	46
<i>Hoffman v. United States</i> , 327 F.2d 489 (9th Cir. 1964) .....	21
<i>Jones v. United States</i> , 258 F.2d 420 (D.C. Cir. 1958), cert. den., 357 U.S. 932 (1958) .....	21
<i>Kapsalis v. United States</i> , 345 F.2d 392 (7th Cir. 1965), cert. den., 382 U.S. 946 (1965) ....	21
<i>Nash v. United States</i> , 342 F.2d 366 (5th Cir. 1965) .....	21
<i>Peters v. United States</i> , 312 F.2d 481 (8th Cir. 1963) .....	20
<i>Plummer v. United States</i> , 260 F.2d 729 (D.C. Cir. 1958) .....	21
<i>Saulsbury v. Green</i> , 347 F.2d 828 (6th Cir. 1965)	27
<i>Sinks v. United States</i> , 318 F.2d 436 (7th Cir. 1963), cert. den., 375 U.S. 946 (1963) .....	21
<i>Springer v. United States</i> , 340 F.2d 950 (8th Cir. 1965) .....	20

## INDEX

v

	Page
<i>Thomas v. United States</i> , 308 F.2d 369 (7th Cir. 1962) .....	21
<i>Thompson v. United States</i> , 315 F.2d 689 (6th Cir. 1963), cert. den., 375 U.S. 843 (1963) .....	21
<i>Thornton v. United States</i> , 368 F.2d 822 (D.C. Cir. 1966) .....	22
<i>United States v. Jenkins</i> , 281 F.2d 193 (3rd Cir. 1960) .....	21
<i>United States v. Re</i> , 372 F.2d 641 (2d Cir. 1967), cert. den., 388 U.S. 912 (1967) .....	21
<i>United States v. Sutton</i> , 321 F.2d 221 (4th Cir. 1963) .....	22, 23
<i>United States v. Winstead</i> , 226 F. Supp. 1010 (N.D. Cal. 1964) .....	23
<i>United States ex rel. Angelet v. Fay</i> , 333 F.2d 12 (2d Cir. 1963) .....	27
<i>United States ex rel. DeNegris v. Menser</i> , 247 F. Supp. 826 (D.C. D. Conn. 1965), aff'd 360 F.2d 199 (2d Cir. 1966) .....	27
<i>United States ex rel. West v. LaVallee</i> , 335 F.2d 230 (2d Cir. 1964) .....	27
<i>Warren v. United States</i> , 311 F.2d 673 (8th Cir. 1963) .....	20
<i>Weed v. United States</i> , 340 F.2d 827 (10th Cir. 1965) .....	46
<i>White v. United States</i> , 235 F.2d 221 (D.C. Cir. 1956) .....	21
<i>Wilkins v. United States</i> , 258 F.2d 416 (D.C. Cir. 1958), cert. den., 357 U.S. 942 (1958) .....	21
<i>William v. United States</i> , 307 F.2d 366 (9th Cir. 1962) .....	21
<i>Williams v. United States</i> , 382 F.2d 50 (5th Cir., 1967) .....	38
<i>Wilson v. Porter</i> , 361 F.2d 412 (9th Cir., 1966) .....	27
<i>Wrightson v. United States</i> , 95 U.S.App. D.C. 390, 222 F.2d 556 (1955) .....	46



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 53

---

HAROLD KAUFMAN,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

BRIEF FOR PETITIONER

---

Opinions of Courts Below

The opinion of the United States District Court for the Eastern District of Missouri, denying petitioner's motion and supplemental motion to vacate sentence under 28 U.S.C. § 2255, is reported at 268 F. Supp. 484 (1967). The order of that court entered on March 27, 1967, denying petitioner's application to appeal *in forma pauperis* has not been reported.

The order of the United States Court of Appeals for the Eighth Circuit, entered on May 11, 1967, denying petition-

er's motion for leave to appeal *in forma pauperis*, and the order of that same court entered on August 7, 1967, denying petitioner's motion for rehearing, have not been reported.

#### **Basis for Jurisdiction**

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The order or judgment sought to be reviewed was rendered by the United States Court of Appeals for the Eighth Circuit on May 11, 1967, denying a motion by petitioner to proceed on appeal *in forma pauperis* from a decision by the United States District Court for the Eastern District of Missouri. Petitioner's motion for rehearing in the Eighth Circuit was denied by order entered on August 7, 1967. The petition for writ of certiorari in this case was filed on Monday, November 6, 1967, within the required time period for filing such a petition.

#### **Constitutional and Statutory Provisions Involved**

**Article I, Section 9, Clause 2 of the Constitution**

**Fourth Amendment to the Constitution**

**Fifth Amendment to the Constitution**

**Sixth Amendment to the Constitution**

**28 U.S.C. § 2241**

**28 U.S.C. § 2255**

(These provisions are set out in Appendix A of this brief.)

### Questions Presented

1. Whether a sentence based upon evidence obtained through an unreasonable search and seizure in violation of the Fourth Amendment is subject to collateral attack under 28 U.S.C. § 2255.
2. Whether failure of Court of Appeals, in petitioner's direct appeal from his conviction, to consider issue of improper search and seizure which, on suggestion of Court of Appeals' clerk, was raised by court-appointed appellate counsel in a letter to Court of Appeals subsequent to oral argument, entitles petitioner to a consideration of the search and seizure issue in a proceeding under 28 U.S.C. § 2255.
3. Whether evidence obtained through a warrantless search of petitioner's automobile several hours after his arrest for a traffic violation, in a garage located some distance from the place of arrest and some distance from the place at which petitioner was being detained, was properly admitted in evidence against petitioner at his trial for robbery of a savings and loan association. Further, whether evidence obtained through a search of petitioner's person at the police station after his arrest on the traffic charge was properly admitted against him.

### Introductory Statement

Page numbers in the printed Appendix, when referred to, shall be prefaced by the letter "A." As used hereinafter, the symbol "R. Cr." shall refer to portions of the record in Case No. 64 Cr. 12(3) which have not been reproduced in the printed Appendix, and the symbol "R. C." shall refer to

portions of the record in Case No. 66 C. 218(3). The letter "T" shall refer to portions of the trial transcript which have not been reproduced in the printed Appendix.

### Statement of the Case and Facts

On December 16, 1963, a branch office of the Roosevelt Federal Savings and Loan Association located in the River Roads Shopping Center, Jennings, Missouri, was robbed by petitioner Harold Kaufman while armed with a pistol. He obtained the sum of \$328.50 in currency and approximately \$11,520.00 worth of travelers' checks. Petitioner had entered at approximately 4:00 P.M., and the robbery began at about 4:10 or 4:13 P.M. The robbery was completed at about 4:19 P.M. (T. 49, 50).

At 4:40 P.M. that same day an officer of the police department of the city of Alton, Illinois, named Charles Stahl, received a message from his dispatcher to proceed to the entrance of a bridge which crosses the Mississippi River at Alton and watch for a 1964 red Rambler automobile bearing New York license plates 8Z6367 possibly coming across the river from Missouri (A. 53, 54). He was told by the dispatcher that the Rambler had been involved in a hit-and-run accident (A. 53). Shortly after receiving this call officer Stahl saw the described automobile coming across the bridge. Stahl followed the Rambler. He signalled for the car to stop. The driver of the Rambler was driving at a slow rate of speed, at approximately 20 to 30 miles per hour (A. 60, 61). He attempted a turn, going up a hill, and when he did the car skidded on the ice, ran up over the sidewalk, and hit a tree. Then the car rolled backward across the street and came to a stop (A. 61, 62).

Officer Stahl and petitioner Harold Kaufman, the driver of the car, got out of their respective cars and discussed the accident that had just occurred. Kaufman was arrested at that time for a traffic violation (A. 54, 55) and a wrecker was called to tow away the automobile. Kaufman was taken to the Alton city police station. The arrest occurred at 4:40 and the officer and Kaufman arrived at the police station at about 4:45 P.M. (A. 55, 56).

At about 4:43 or 4:44 P.M. that day Cliff Martin, who operated a towing service in Alton, received a call from the Alton police to tow in the Rambler (A. 66). He arrived at the scene within two or three minutes (A. 66), picked up the car and towed it to his place of business (A. 64). After Mr. Martin had parked the car in the garage, and while he was checking the car for personal belongings, he saw a pistol on the back seat of the car with the barrel pointing against the left-hand panel. Mr. Martin phoned the police department, told them he had found a pistol in the car and asked them to send a man out to take care of it (A. 65). Officer Stahl was sent to the garage. Martin stuck a pencil in the barrel end of the pistol, took it out of the car, brought it into his office and placed it on a towel on his desk. According to Martin, when Stahl arrived he (Stahl) told Martin to finish wrapping it and to lock it up until the F. B. I. arrived and Martin did as he was told (A. 65, 66). According to officer Stahl's version, Stahl saw the pistol in the car and saw Martin remove it from the car (A. 58, 59). Subsequently an F. B. I. agent came to the garage and picked up the pistol (A. 65, 66).

Back at the Alton police station officers Stahl and John Light of the department, in the presence of Captain Petersen, made a search of Kaufman's person and found ap-

proximately \$352.00 in currency and a contract for the rental of the Rambler showing that the car had been leased to one Arthur Cooper (A. 67-72; 80-81). The currency was later released to the F. B. I. (A. 71). The search of Kaufman's person was apparently considered a search by the police and not a mere inventory of his personal belongings (A. 67-72; 86-87). It is not clear, from the trial transcript, what time it was when this search was conducted. Further, it is not clear whether the search of Kaufman's person was conducted before or after the discovery of the pistol by Cliff Martin, or whether the police knew, at the time of the search of Kaufman's person, that the pistol had in fact been found in the Rambler by Martin.

An F. B. I. agent named Albert Rushing was ordered by his St. Louis office to go to the Alton police station. He arrived there at about 6:30 P.M. After his arrival Captain Peterson turned over to Rushing the auto rental contract and the \$352.00 which the police had obtained in the search of Kaufman's person (A. 80-83; 86-87). Between 6:40 and 7:00 P.M. Rushing told Kaufman that federal charges were going to be filed (A. 87, 104). At 8:00 P.M. Kaufman was taken by F. B. I. agents to St. Louis and deposited in a jail in St. Louis at about 9:55 that evening (A. 103, 93). He was given a preliminary hearing the following morning, December 17 (A. 92).

F. B. I. agents named John Newcomer and James Talley, who had been investigating the robbery of the Roosevelt Federal Savings and Loan Association, were ordered, at 7:30 P.M. (A. 78, 79) by their St. Louis office to go directly from the scene of the robbery to the Cliff Martin towing service garage in Alton where the Rambler was located. They arrived there at about 9:00 P.M. (A. 78, 79). They

searched the car without a search warrant (A. 72-79). The search lasted approximately two hours (A. 78). At the time of the search these agents did not know whether Kaufman was under arrest by the United States (A. 78). On the "floor board" they found two packets of American Express travelers' checks, having a face value of \$11,520.00 (A. 73). Also, "in the car" they found a summons for traffic violations issued by the Criminal Court of the City of New York (A. 75); a receipt dated December 15, 1963, showing that gasoline had been purchased on that date in Harrisburg, Pennsylvania (A. 75); a Western Union telegraph receipt dated December 15, 1963, in Harrisburg, Pennsylvania, showing payment of \$50.00 from Paul King (an alias for Harold Kaufman) to Mrs. Pat Scott in New York City (A. 90, 75); and a receipt for road service dated December 15, 1963, in Willow Grove, Pennsylvania (A. 75, 76). Further, they found a receipt showing that the pistol found in the car had been purchased on December 16, 1963, that same day, at Wittel's Gun Shop in Alton.<sup>1</sup>

Attorney John R. Barsanti, Jr. of St. Louis, Missouri, was appointed (R. Cr. 55) by the United States District Court for the Eastern District of Missouri, to defend Harold Kaufman. Kaufman was indicted for the crime of armed robbery of the Roosevelt Federal Savings and Loan Association in violation of 18 U.S.C. § 2113(a) and (d).

---

<sup>1</sup> This receipt was never introduced in evidence at Kaufman's trial, and therefore there is no reference to it in the record in this case. The fact that such a receipt was found in the car was first made known to undersigned counsel through a letter from petitioner, at the United States Penitentiary, Terre Haute, Indiana, dated July 29, 1968. This has been verified through a telephone conversation between petitioner, in Terre Haute, and undersigned counsel, in Atlanta, on August 1, 1968.

When Mr. Diggs received this letter from Harold Kaufman, according to his affidavit in Appendix C of this brief:

"... I was still of the opinion that the illegal search and seizure issue was without merit. However, I determined to take every precaution to follow his desires, and accordingly, went to the court and discussed with the clerk the matter of raising the issue of illegal search and seizure at that time. Mr. Tucker, the Clerk of the Court, informed me that in his opinion there was no formal way to bring the issue of illegal search and seizure before the court at that time. However, he suggested that I send Mr. Kaufman's letter to him, requesting that it be brought to the attention of the judge who had heard my argument. I followed his advice, sending Mr. Kaufman's letter to Mr. Tucker on June 17, 1965."

Pursuant to the advice given him by Mr. Tucker, Mr. Diggs forwarded Kaufman's letter of April 26, 1964, together with some other correspondence which he had received from Kaufman, to Mr. Tucker. The cover letter is dated June 17, 1965, and in it Mr. Diggs said the following:

"I enclose herewith letters which I have received from Mr. Kaufman since I argued the above captioned cause on March 9, 1965. You will notice that in his letter of April 26, 1965 that he has cited the case of Preston vs. United States, which he contends indicates that there was a blatant violation of his constitutional rights in the search of his automobile following the armed robbery on which he was convicted."

• • • •

(This letter is set out in its entirety in Appendix D of this brief, *infra*.)

The Court of Appeals affirmed Kaufman's conviction by opinion dated September 8, 1965, rehearing denied October 18, 1965, without making any reference to the search and seizure issue, 350 F.2d 408.

Attorneys Robert O. Hetlage and Walter E. Diggs, Jr. then filed a petition for writ of certiorari in this Court (October Term, 1965), raising the following issue, among others:

"Whether evidence obtained by an F.B.I. search of Petitioner's automobile without a warrant approximately five hours following his arrest for a traffic violation was properly admissible in a subsequent trial for armed robbery of a federally insured savings and loan association...."

(See page 2 of the petition for writ of certiorari in the file of this Court in No. 1025, Misc., October Term, 1965.)

In their 1965-66 petition for certiorari the attorneys for petitioner Kaufman stated that, after the argument of the appeal before the Eighth Circuit, following a procedure suggested by the clerk of that court, Mr. Diggs had written a letter to the court raising the search and seizure issue and enclosing a letter from Kaufman citing the *Preston* case, but that the Eighth Circuit had been silent on the issue in its opinion (see pages 4. and 5. of the 1965-66 petition for writ of certiorari). This Court denied the petition, 383 U.S. 951 (1966).

No motion to suppress any of the above-described evidence was made in Kaufman's behalf prior to the trial.

Kaufman was tried by a jury on August 24 through 27, 1964. In his opening statement, Mr. Barsanti conceded the fact that defendant was the man who had robbed the Roosevelt Federal Savings and Loan Association on December 16, 1963, but he stated that defendant was legally insane at the time (A. 36-38).

During the trial the American Express travelers' checks which had been obtained by the F. B. I. during the search of the Rambler were admitted in evidence, without objection by the defense (Govt. Exs. 5-A and 5-B; A. 48).

The pistol which had been found and removed from the back seat of the Rambler by Cliff Martin was admitted in evidence, without objection (Govt. Ex. 6; T. 59, 60). Also, the prosecution presented testimony of John Davis, the manager of Wittel's Gun Shop in Alton to the effect that Kaufman, using the name of Arthur Cooper, had purchased the pistol from Davis on December 16, 1963. He testified that he and Kaufman had talked for 20 or 25 minutes, and that during this conversation Kaufman had talked normally, coherently, and had not appeared to be nervous or agitated (A. 51, 52). During the purchase Kaufman had filled out

<sup>2</sup> Petitioner Kaufman stated to undersigned counsel, in their telephone conversation of August 1, 1968, mentioned in footnote 1, that John Davis and Wittel's Gun Shop were connected to the crime, traced and located by the police or F. B. I., either through the serial number on the pistol or through the receipt for the gun which had been found during the search of the Rambler by the F. B. I. (See footnote 1.) Therefore, if either the pistol or the receipt was obtained through an unreasonable search and seizure, the entire testimony of John Davis is tainted as the product or "fruit" of an illegal search and seizure and should not have been used against petitioner in his trial. This testimony was extremely

a gun registration card, and this card was introduced in evidence at the trial, without objection (Govt. Ex. 7; T. 59, 60).

The auto rental contract in the name of Arthur Cooper and a portion of the \$352.00 which had been taken from Kaufman during the search of his person conducted at the Alton police station subsequent to his arrest (the portion representing the proceeds of the robbery) were introduced in evidence (Govt. Exs. 8 and 13; A. 83). Mr. Barsanti objected to the introduction of these exhibits and moved that they be excluded on the ground that they were taken from the person of Harold Kaufman illegally as evidence for use in the robbery case, in the course of a traffic investigation (A. 67, 68, 83). Mr. Barsanti's objections were overruled by the court.

The summons from the Criminal Court of the City of New York which had been found by F. B. I. agents during the search of the Rambler at Cliff Martin's garage was admitted in evidence (Govt. Ex. 9; A. 75, 76); the gasoline receipt, dated December 15, 1963, in Harrisburg, Pennsylvania, was admitted against defendant (Govt. Ex. 10; A. 75, 76); the Western Union money order telegraph receipt, also dated December 15, 1963, in Harrisburg, showing payment of \$50.00 to Mrs. Pat King was admitted (Govt. Ex. 11; A. 75, 76) as Exhibit 11 (Tr. 105, 106) and the gasoline receipt of the same date from Willow Grove, Pennsylvania, was admitted (Govt. Ex. 12; A. 75, 76). Mr. Bar-

---

prejudicial to petitioner. In a letter dated July 29, 1968, to undersigned counsel, petitioner said the following:

"... Please in the brief hit hard and often on the prejudice to the insanity defense this evidence caused, remember the salesman of the gun testified and hurt me bad, his name was gotten from the gun and the receipt in the car."

santi objected to the admission of these four exhibits on the ground that they had been obtained by the F. B. I. through an illegal search at a time when Kaufman was under arrest on nothing more than a traffic charge (A. 75-78).

Kaufman's defense was that he had been legally insane at the time of the robbery. He had a number of witnesses, including psychiatrists, who gave evidence tending to establish that he had been insane at the time of the crime. Kaufman did not testify in his own behalf.

In rebuttal, the government introduced testimony of F. B. I. agents George Peet and Franklin Walls, who had interrogated Kaufman in Alton and St. Louis following his arrest, to the effect that Kaufman had been "coherent," "intelligent," "logical" and "sane" at the time (A. 92 through 121). The prosecution used Government Exhibits 8 through 12 to show where Kaufman had been during the day or two preceding the day of the robbery (A. 77, 78), and, further, that during the two days immediately preceding the robbery he had been rational, competent and sane enough to drive a car almost half the way across the United States, from New York to St. Louis, and to purchase gasoline, and wire \$50.00 by Western Union to Mrs. Pat Scott, his girl friend in New York. The following excerpt from the closing argument of the prosecutor, Mr. Martin, will illustrate how Exhibits 9 through 12 (and the auto rental contract, Exhibit 8) were used as rebuttal evidence against Kaufman on the insanity issue:

"... As a matter of fact, you recall the opening statement of the defense counsel, and the other events of the trial which indicate that the defendant does not contest the fact that he committed the act alleged in

the indictment. The only issue now remaining in the case is whether or not the defendant was legally sane, legally responsible for his criminal act on that date.

"Having admitted the commission of the crime, ordinarily I would not have to go into the details of the acts which he committed at that time, but, however, on the question of sanity, I would like to bring this to you and remind you it's a question of his sanity on December 16, 1963. Was he legally sane on that date? That is the question for you to determine. You may consider all of the evidence which has been introduced, but you come right back to the focal point, was he legally sane and criminally responsible for his act on December 16, 1963?

"In order to determine that, you must examine what he did, how he did it, what were his actions, what was his condition at that time. *You may also consider acts previously, and acts after December 16, but you come right back to the point of what was his condition on December 16, 1963.*

"Now, we have introduced evidence showing that the automobile he was driving on December 16, 1963, came from New York. Here is Exhibit 8, the Rental Contract for that automobile in the name of Arthur Cooper. Here is a traffic ticket, City of New York, showing that the automobile was in New York City. I am trying to find the date on this ticket. I had it at one time on December 14 of 1963. We showed you receipts for gasoline along the route between New York to St. Louis. We have here a receipt from the Western Union showing telegraphing of the money from Harrisburg, Pennsylvania, to New York City, to Mrs. Patricia [sic] Scott, on December 15th.

"These are some of the things showing what he was doing when he was coming from New York to St. Louis in this automobile, and when he gets to the vicinity of St. Louis, he stops in Alton, Illinois, and he uses the name Arthur Cooper, the same name that is on the rental contract, for the purpose of purchasing a revolver which was registered in the name of Arthur Cooper with the gun sales company.

"At that time he displayed no nervousness. His conversations with the salesman at the time he was making that purchase appeared to the salesman to be perfectly normal. I think there was some testimony that he was purchasing it for the purpose of a gift to his son, but all of that activity so far seems perfectly normal."

(Emphasis added) (A. 122 through 124).

The defendant was found guilty by the jury on August 27, 1964, and was sentenced on that same day to a term of 20 years (T. 481, 482).

A direct appeal in Kaufman's behalf to the United States Court of Appeals for the Eighth Circuit *in forma pauperis* and attorneys Barsanti and Singer were granted leave to withdraw (R. Cr. 83-85). Attorney Walter E. Diggs, Jr., of St. Louis, was appointed to represent Kaufman in the appeal.

Upon the appointment of Mr. Diggs, Kaufman wrote to him from New York (where he was then confined on an unrelated matter), and told Mr. Diggs that there were several points which should be raised in the appeal, including the issue of whether or not evidence obtained from his

person and his car subsequent to his arrest should have been excluded as evidence at his trial. (See affidavit of Harold Kaufman in Appendix B of this brief, *infra*.)

In his briefs and in oral argument which took place on March 9, 1965, Mr. Diggs did not raise any search and seizure issue, considering such issue to be without merit. (See affidavit of Walter E. Diggs, Jr., included in this brief as Appendix C, *infra*.) On April 26, 1965, Harold Kaufman wrote a letter to Mr. Diggs, in which, among other things, he said the following:

"... I have discovered a very serious and prejudicial error in the trial. I have also found the leading and most recent Supreme Court decision on this. I feel if nothing else this could guarantee a new trial.

"... [T]here were timely and many objections to the introduction of the evidence that were [sic] taken from the car. Also the money that was taken from my coat, that I was no longer wearing. The main and pertinent part is that I was arrested at 4:00 P. M. in the a place [sic] the car was seized and taken to a garage under police custody and searched at 6:00 to 8:00 P. M. without a search warrant by the F.B.I. and the local police. In Preston v. U. S., . . . adjudicated on March 23, 1964. I am certain as you read this case, and read the transcript you will come to the conclusion this was a blatant violation of my Constitutional rights in the search of the car. . . .

"The problem how [sic] can we make it timely again? I leave this too [sic] you."

(This letter is set out in its entirety in Appendix D of this brief, *infra*.)

On June 13, 1966, Kaufman filed a motion to vacate sentence under 28 U.S.C. § 2255 in the United States District Court for the Eastern District of Missouri (A. 3 through 11). Attorney A. H. Hamel, of Clayton, Missouri, was appointed to represent Kaufman, and Hamel filed a supplemental motion to vacate on September 9, 1966 (A. 12 through 14). In the supplemental motion attorney Hamel alleged, among other grounds, that all physical evidence taken from the Rambler after Kaufman's arrest had been obtained through an unlawful search and seizure (A. 13).

An evidentiary hearing was held on the motion and supplemental motion and, on March 16, 1967, the district court filed a memorandum opinion and order denying the motion and supplemental motion (A. 17-26). This opinion is reported at 268 F. Supp. 484 (1967). Only the following brief reference was made, in that opinion and order, to the search and seizure issue:

• • • • •

"The supplemental motion to vacate, prepared by appointed counsel, asserts as a further ground for relief that certain physical evidence was obtained by an allegedly unlawful search and seizure of Kaufman's automobile after his arrest. The record does not substantiate this claim. In any event, this matter was not assigned as error on Kaufman's appeal from conviction and is not available as a ground for collateral attack on the instant § 2255 motion. See *Warren v. United States*, 8 Cir., 311 F.2d 673, 675 (1963); *Springer v. United States*, 8 Cir., 340 F.2d 950 (1965)" (A. 21).

On March 27, 1967, the district court entered an order refusing to allow Mr. Kaufman to appeal *in forma pauperis* from the order of March 16, 1967 (R. C. 86). On May 11,

1967, the United States Court of Appeals for the Eighth Circuit denied his motion for leave to proceed on appeal *in forma pauperis* from the decision of the district court (R. C. 88). Motion for rehearing was denied by the Eighth Circuit on August 7, 1967. (See Exhibit "C" attached to the petition for writ of certiorari filed in this cause on November 6, 1967.) It is the decision of the United States Court of Appeals, denying petitioner's motion to appeal *in forma pauperis* from the district court's decision of March 16, 1967, which is under review in the present proceeding.

### Summary of Argument

The exclusionary rule, under which evidence obtained illegally by police is inadmissible in the trial for a criminal offense, only recently became a constitutional requirement. Prior to 1961 the exclusionary rule was a mere rule of court or rule of evidence.

Federal habeas corpus for state prisoners and 28 U.S.C. § 2255 (the federal inmate's equivalent of habeas corpus), can only be used to attack criminal convictions and sentences on jurisdictional or constitutional grounds. Historically these remedies have not been available to correct mere evidentiary errors which took place at the trial. These errors can ordinarily be reviewed only through direct appeal.

Prior to the time the exclusionary rule became a matter of constitutional law, the courts refused to allow federal inmates to raise questions arising under the exclusionary rule through the use of § 2255. Since 1961, even though questions arising under the exclusionary rule are now constitutional questions, some of the United States courts of

appeal still refuse to allow these illegal search and seizure questions to be raised by collateral motion to vacate under § 2255. At least two circuits, on the other hand, now allow federal inmates to raise such issues in § 2255 proceedings on the ground that 2255 should be available to raise any issue regarding infringement of constitutional rights. It is submitted that this is the proper view.

This Court has said that the remedy provided the federal inmate under § 2255 must be as broad and effective as the remedy which is available to the state prisoner through federal habeas corpus. In fact, there would be grave doubts concerning the constitutionality of § 2255 if a federal inmate using that remedy were provided a less effective remedy than that provided under the constitutional provision guaranteeing the right to habeas corpus and statutes implementing that constitutional provision.

This Court and many of the lower federal courts have recognized, either expressly or tacitly, that questions arising under the exclusionary rule may be raised by state prisoners through the use of federal habeas corpus. Since the remedy under § 2255 must be as broad and effective as the remedy of habeas corpus, it is clear that federal inmates should have an equal right to raise illegal search and seizure questions through § 2255.

Petitioner was denied the right to appellate review of the illegal search and seizure issue which, he had consistently maintained, had merit. His appointed appellate attorney did not raise the point in the briefs or oral argument before the court of appeals, even though petitioner had suggested to him that the point be raised. Then, after oral argument, petitioner wrote to the attorney and again asked that the point be raised. The attorney went to the clerk of

the court, who incorrectly advised the attorney that there was no formal way of raising the issue at that time, but that if the attorney would forward petitioner's letter to him, he would submit the letter to the panel of judges considering the case. The attorney did so, and the letter was given to the panel; but, in its opinion several months later affirming petitioner's conviction, the court was silent on the illegal search and seizure issue. Thus, the issue was not considered, through no fault of petitioner. Petitioner was deprived of his right to appeal, his right to effective representation by counsel on this issue, and has been deprived of due process. He is entitled to a review of the illegal search and seizure issue and the means available to him to obtain a review of this issue is the remedy provided by 28 U.S.C. § 2255.

Evidence was taken through a search of petitioner's person at the police station—some time after his arrest on a traffic charge. Also, evidence was taken during a search of the car, which he had had lawful permission to use, at a garage where it had been towed, some time after the arrest and some distance away from the place of the arrest and the place where petitioner was being detained. Neither of these searches was based upon a warrant. These searches were too far removed from the time and place of the arrest and cannot be considered valid as incident to his arrest. The evidence thus found was used against petitioner at his trial for robbery of a savings and loan association on the controversied issue of whether or not he was insane at the time of the crime. The evidence was highly prejudicial to him on this issue and contributed to his conviction. He has thus been unfairly convicted and sentenced to a term of twenty years.

**ARGUMENT****1.**

**A Sentence Based Upon Evidence Obtained Through an Unreasonable Search and Seizure in Violation of the Fourth Amendment Is Subject to Collateral Attack Under 28 U.S.C. § 2255.**

**A. THE EIGHTH CIRCUIT AND SOME OF THE OTHER CIRCUITS FOLLOW THE RULE THAT ILLEGAL SEARCH AND SEIZURE CLAIMS CANNOT BE RAISED BY § 2255.**

The United States District Court for the Eastern District of Missouri, in its opinion denying petitioner relief under 28 U.S.C. § 2255, stated that Kaufman's allegation in his motion to vacate that certain items of physical evidence were obtained through an unlawful search and seizure of his car could not be considered in a collateral attack on his conviction under § 2255. In support of this statement the court cited *Warren v. United States*, 311 F.2d 673 (8th Cir., 1963) and *Springer v. United States*, 340 F.2d 950 (8th Cir., 1965). In these cases the United States Court of Appeals for the Eighth Circuit has indicated that the issue of whether illegally obtained evidence was improperly used against a criminal defendant at his trial is an evidentiary issue which can be reviewed only by appeal, and that § 2255 cannot be used as a substitute for appeal. See also, *Cox v. United States*, 351 F.2d 280 (8th Cir., 1965); *Gendron v. United States*, 340 F.2d 601 (8th Cir., 1965); and *Peters v. United States*, 312 F.2d 481 (8th Cir., 1963).

Some of the courts of appeal in other circuits also follow the strict rule that a claim of illegal search and seizure may not be raised collaterally under 28 U.S.C. § 2255.

For example, see *United States v. Re*, 372 F.2d 641 (2d Cir., 1967), cert. den., 388 U.S. 912 (1967); *United States v. Jenkins*, 281 F.2d 193 (3rd Cir., 1960); *Nash v. United States*, 342 F.2d 366 (5th Cir., 1965); *Armstead v. United States*, 318 F.2d 725 (5th Cir., 1963); *Eisner v. United States*, 351 F.2d 55 (6th Cir., 1965); *Thompson v. United States*, 315 F.2d 689 (6th Cir., 1963), cert. den., 375 U.S. 843 (1963); *DeWelles v. United States*, 372 F.2d 67 (7th Cir., 1967); *Kapsalis v. United States*, 345 F.2d 392 (7th Cir., 1965), cert. den., 382 U.S. 946 (1965); *Sinks v. United States*, 318 F.2d 436 (7th Cir., 1963), cert. den., 375 U.S. 946 (1963); *Thomas v. United States*, 308 F.2d 369 (7th Cir., 1962); *Williams v. United States*, 307 F.2d 366 (9th Cir., 1962); *Hoffman v. United States*, 327 F.2d 489 (9th Cir., 1964).

B. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA HAS RECENTLY ADOPTED A MODIFIED RULE ALLOWING SEARCH AND SEIZURE ISSUES TO BE RAISED UNDER § 2255 IN "EXCEPTIONAL CIRCUMSTANCES."

Prior to this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), the United States Court of Appeals for the District of Columbia followed the general rule that illegal search and seizure issues are evidentiary in nature and may not be raised in a collateral attack against a sentence under § 2255. *Plummer v. United States*, 260 F.2d 729 (D.C. Cir., 1958); *Wilkins v. United States*, 258 F.2d 416 (D.C. Cir., 1958), cert. den., 357 U.S. 942 (1958); *Jones v. United States*, 258 F.2d 420 (D.C. Cir., 1958), cert. den., 357 U.S. 932 (1958); *Edwards v. United States*, 256 F.2d 707 (D.C. Cir., 1958), cert. den., 358 U.S. 847 (1958); and *White v. United States*, 235 F.2d 221 (D.C. Cir., 1956). That court, however, has modified its position in the 1966 case of

*Thornton v. United States*, 368 F.2d 822 (D.C. Cir., 1966). The court, speaking through Judge Leventhal, stated that, although ordinarily a claim by a federal prisoner that evidence admitted at his trial was the fruit of an unconstitutional search or seizure is not properly a ground for collateral attack of his conviction, exceptional circumstances may warrant the use of § 2255 for the claim of unconstitutional search and seizure. Such circumstances would include claims such as ineffective assistance of counsel resulting in a denial of Sixth Amendment rights. In the case at hand no such circumstance was found and Thornton was denied relief. Judge J. Skelly Wright dissented from this opinion, being of the view that an illegal search and seizure raised in a § 2255 motion should be heard on the merits if the prisoner can demonstrate that a redetermination of this issue would serve the ends of justice and that his failure to assert the claim in his direct appeal did not amount to a deliberate bypass of federal remedies.

C. COURTS OF APPEAL IN AT LEAST TWO CIRCUITS HAVE TAKEN THE MORE LIBERAL VIEW THAT § 2255 IS AVAILABLE TO RAISE ILLEGAL SEARCH AND SEIZURE ISSUES.

There are at least two circuits in the United States that have indicated that illegal search and seizure issues can be raised by § 2255. The United States Court of Appeals for the Fourth Circuit, in *United States v. Sutton*, 321 F.2d 221 (4th Cir., 1963), stated that the question of whether evidence has been seized in violation of the Fourth Amendment is a constitutional question which can be raised on 2255, even though no appeal has been prosecuted in the case. According to that court, there is a clear distinction between constitutional and jurisdictional defects on the one hand

and ordinary trial errors, on the other. Constitutional issues should be cognizable under 28 U.S.C. § 2255.

In the case of *Gaitan v. United States*, 317 F.2d 494 (10th Cir., 1963), the issue of admissibility of illegally seized evidence was said to have a constitutional basis, and hence the remedy of § 2255 is available to raise this issue. The court pointed out that § 2255 is commensurate with the remedy available by habeas corpus.<sup>3</sup> See also *United States v. Winstead*, 26 F. Supp. 1010 (N.D. Cal. 1964). It should be noted that § 2255 itself provides that a motion to vacate will lie if there has been a denial or infringement of the constitutional rights of the prisoner such as to render the judgment of conviction vulnerable to collateral attack. (See § 2255, set out in Appendix A of this brief.)

#### D. THE SCOPE OF THE REMEDY PROVIDED BY § 2255 MUST BE AS BROAD AND EFFECTIVE AS THE REMEDY OF HABEAS CORPUS.

Article I, Section 9, Clause 2 of the Constitution guarantees that, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." This constitutional provision has been implemented by the statutory provisions found in 28 U.S.C. § 2241, *et seq.* Prior to 1948 the application for a writ of habeas corpus was made before a judge in the district within which the prisoner was being held. This led to a disproportionate number of petitions

<sup>3</sup> In both *Sutton* and *Gaitan* the courts affirmed decisions of district courts denying relief, under § 2255, to the prisoners involved. The statements in those cases broadening the scope of § 2255 to include attacks upon sentences on search and seizure grounds are, technically, *dicta*.

being filed before judges in districts in which federal prisons were located, and this created serious administrative problems. To correct this imbalance, Congress in 1948 enacted a complete revision of the habeas corpus provisions of Title 28. The purpose of § 2255 was to provide an expeditious remedy for correcting erroneous sentences. [See reviser's note following 28 U.S.C.A. § 2255 (1959).] The terms of § 2255 render an application under its provisions a prerequisite to application for a writ of habeas corpus unless the remedy under § 2255 is inadequate or ineffective. In actual practice § 2255 has been almost the exclusive remedy available to federal prisoners, since the circumstances in which § 2255 has been held inadequate or ineffective are extremely rare. The replacement of habeas corpus by § 2255 was not meant in any way to affect or diminish the scope of the remedy available to federal prisoners. In the case of *United States v. Hayman*, 342 U.S. 205 (1952), this Court, after tracing the legislative history of § 2255, pointed out that the sole purpose of § 2255 was to minimize the difficulties encountered in habeas corpus by affording the same rights in another and more convenient forum, 342 U.S. at 219. Since *Hayman*, this Court has reaffirmed that the scope of the remedy afforded by § 2255 must be commensurate with the remedy provided by habeas corpus, *Sanders v. United States*, 373 U.S. 1 (1963). In *Sanders*, this Court, speaking through Mr. Justice Brennan, pointed out that 2255 is as broad a remedy as habeas corpus:

". . . Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions . . ." (373 U.S. at 13).

• • • •

"...Indeed, if he [a prisoner invoking § 2255] were subject to any substantial procedural hurdles which made his remedy under § 2255 less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered, . . ." (373 U.S. at 14).

Accordingly, the scope of the remedy provided by § 2241, on the one hand, and § 2255, on the other hand, must be equal.

**E. HABEAS CORPUS MAY BE USED TO ATTACK A CONVICTION ON CONSTITUTIONAL GROUNDS AS WELL AS ON JURISDICTIONAL GROUNDS.**

Habeas corpus in federal courts is not restricted to cases where the judgment of conviction is jurisdictionally void, but extends also to exceptional cases in which there has been a disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights, *Waley v. Johnston*, 316 U.S. 101 (1942). See also *Fay v. Noia*, 372 U.S. 391, 404-415 (1963).

**F. AT LEAST SINCE MAPP v. OHIO, THE EXCLUSIONARY RULE OF THE FOURTH AMENDMENT HAS BECOME A CONSTITUTIONAL RULE RATHER THAN A MERE RULE OF EVIDENCE, AND SEARCH AND SEIZURE ISSUES CAN THEREFORE BE RAISED ON HABEAS CORPUS.**

In 1961, in the case of *Mapp v. Ohio*, 367 U.S. 643 (1961), if not before that time, the exclusionary rule of the Fourth Amendment was elevated to the status of a constitutional requirement. It would seem, therefore, that at least since 1961, allegations concerning the use of illegally seized

evidence can and should be cognizable by habeas corpus. This is, in fact, the case. For instance in the very recent case of *Carafas v. LaVallee*, 36 L.W. 4409 (1968), the petitioner, a state prisoner, had filed an application for habeas corpus in a federal district court, alleging that illegally seized evidence had been used against him in his state trial. His application was dismissed, the United States Court of Appeals for the Second Circuit denied the petitioner's application for relief to appeal *in forma pauperis* and dismissed the appeal. Before this Court, on certiorari, the question of whether his case was moot was resolved in the petitioner's favor. Implicit in the holding of this Court is the premise that illegal search and seizure questions can be raised, at least under some circumstances, through federal habeas corpus.

In *Henry v. Mississippi*, 379 U.S. 443 (1965), the petitioner, a Mississippi state defendant, had raised an illegal search and seizure question during the trial and during the appeal of his case in state courts. The Supreme Court of Mississippi upheld his conviction and this Court granted certiorari. Although the case did not reach this Court on review of a decision in a habeas corpus or collateral proceeding, the following statement was made in the opinion:

"... [P]etitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts. . ." (379 U.S. at 452)

There are a number of lower federal court cases in which prisoners filing petitions for habeas corpus have raised the

issue of whether or not they have been improperly convicted on the basis of illegally seized evidence. For example, see *U. S. ex rel. DeNegris v. Menser*, 247 F. Supp. 826 (D.C. D. Conn. 1965), *aff'd* 360 F.2d 199 (2d Cir., 1966); *United States ex rel. West v. LaVallee*, 335 F.2d 230 (2d Cir., 1964); *United States ex rel. Angelet v. Fay*, 333 F.2d 12 (2d Cir., 1963); *Saulsbury v. Green*, 347 F.2d 828 (6th Cir., 1965); *California v. Hurst*, 325 F.2d 891 (9th Cir., 1963); *Wilson v. Porter*, 361 F.2d 412 (9th Cir., 1966); *Dillion v. Peters*, 341 F.2d 337 (10th Cir., 1965); and *Coleman v. Maxwell*, 351 F.2d 285 (10th Cir., 1965).

#### G. CONCLUSION.

As pointed out in the *Hayman* case and in the *Sanders* case, *supra*, § 2255 should be considered fully as broad a remedy as the remedy of habeas corpus or else serious constitutional questions will be raised regarding suspension of the constitutional right to habeas corpus. State inmates, using the remedy of habeas corpus, and federal inmates, using § 2255, should be treated equally and, since a state inmate can raise illegal search and seizure questions through the medium of habeas corpus, the federal inmate should have the right to raise the same issues through the use of § 2255.

Section 2255, by its very terms, provides that a Federal prisoner must utilize 2255 and is not eligible for relief by habeas corpus unless it appears that 2255 is "inadequate" or "ineffective" to test the legality of his detention. If 2255 is not available to a federal inmate to raise the issue of whether his conviction was based on illegally obtained evidence, the inmate should be entitled to bypass 2255 and present this ground by habeas corpus. In fact, in the in-

stant case, we submit that the United States District Court for the Eastern District of Missouri, after determining that Kaufman was not entitled to raise his search and seizure issue under 2255 under Eighth Circuit decisions, should have then considered Kaufman's motion as a petition for writ of habeas corpus and in that way should have provided him a review of his search and seizure claims.

## 2.

**Failure of Court of Appeals, in Petitioner's Direct Appeal From His Conviction, to Consider Issue of Improper Search and Seizure Which, on Suggestion of Court of Appeals' Clerk, Was Raised by Court-Appointed Appellate Counsel in Letter to Court of Appeals Subsequent to Oral Argument, Entitled Petitioner to a Consideration of the Search and Seizure Issue in a Proceeding Under 28 U.S.C. Section 2255.**

**A. EVERY CONVICTED CRIMINAL DEFENDANT HAS THE RIGHT TO APPEAL AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN HIS APPEAL.**

Every convicted federal criminal defendant has a statutory right to appeal, *Boruff v. United States*, 310 F.2d 918 (5th Cir. 1962), and a right to representation by counsel in such appeal, *Ellis v. United States*, 356 U.S. 674 (1958); and *Johnson v. United States*, 352 U.S. 565 (1957). See also *Douglas v. California*, 372 U.S. 353 (1963). The right to counsel, during every stage at which such right exists, means the right to effective assistance of counsel, *Powell v. Alabama*, 287 U.S. 45 (1932).

### B. RECENT CASES INVOLVING LOSS OF RIGHT TO APPEAL.

In *Fallen v. United States*, 378 U.S. 139 (1964), the defendant had been represented at the trial by a court-appointed attorney. During sentencing the defendant asked the court if he could appeal his case "as an insolvent," and he was told by the trial judge that he could. After sentencing the defendant asked the attorney if he would represent the defendant on appeal. The attorney said that he would not and advised the defendant to secure another attorney promptly so as not to forfeit his right of appeal. The day after sentencing the defendant was transferred to the United States Penitentiary in Atlanta. During the ten-day period for taking an appeal he wrote a letter to the clerk of the trial court asking for a new trial and an appeal. This letter was apparently placed in the mail at the prison by defendant within the time for taking an appeal. Fourteen days after the sentencing, the clerk of the trial court received the letter. The defendant's appeal was not timely and was therefore dismissed. On certiorari to this Court the decision was reversed. The defendant had done all he could, under the circumstances, to give notice within the required time period, and it was held that under these circumstances he should be allowed to appeal. Although this case involved an entire loss of the right to appeal, while in the case at hand we are concerned with the loss of the right to effectively present an important issue or ground for reversal, the cases are similar in that the defendants involved (Fallen and Kaufman) both lost their rights through no fault of theirs but through circumstances over which they had no control.

In 1967 this court decided two cases involving the failure, by appointed appellate counsel, to obtain adequate review,

on appeal, of defendants' cases. In the first of these, *Anders v. California*, 386 U.S. 738 (1967), defendant had been convicted in state court and counsel was appointed for him to take his appeal. However, after a study of the record and consultation with the defendant, the appointed counsel concluded that there was no merit to the appeal. He so advised the court by letter and, at the same time, informed the court that the petitioner wished to file a brief in his own behalf. At this point the defendant requested the appointment of another attorney. This request was denied and the defendant proceeded to file his own brief *pro se*. The conviction was affirmed. Six years later the convicted prisoner filed an application for writ of habeas corpus in the California District Court of Appeals, asking to have his case reopened. In that application he raised the issue of deprivation of the right to counsel in his original appeal because of the court's refusal to appoint counsel at the appellate stage of the proceedings. That court denied the application. Anders then submitted a petition for writ of habeas corpus to the Supreme Court of California but the petition was denied by that court. This Court reversed the decision of the California Supreme Court, holding that the treatment received by the defendant did not comport with the requirements of the Fourteenth Amendment. Appointed counsel must act the role of an active advocate in behalf of his client, and his role as an advocate requires that he support his client's appeal to the best of his ability. If counsel finds the case to be without merit, after a conscientious examination of it, he should advise the court and request permission to withdraw. Such a request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of

the attorney's brief should be furnished the indigent and time allowed him to raise any points that he chooses. The court, not counsel, then should proceed, after a full examination of all of the proceedings, to decide whether the case is wholly frivolous. In the present case, Kaufman's appointed appellate counsel decided not to raise the illegal search and seizure issue even though Kaufman had requested that it be raised. Under such circumstances, the *Anders* case would seem to require that the appointed attorney file a brief on the point and give the court an opportunity to decide whether the issue is frivolous.

In *Entsminger v. Iowa*, 386 U.S. 748 (1967), the petitioner had been convicted in state court. A court-appointed attorney prepared and filed a notice of appeal. Under Iowa law there were alternative methods of appealing criminal convictions. The first method is an appeal on a "clerk's transcript." Under this procedure the clerk of the trial court would prepare and file a modified transcript of the proceeding below, containing only the indictment or information, the grand jury minutes, various orders and judgment entries of the court, but not the transcript of evidence. This practice was used in the absence of a request on the part of counsel for a plenary review of the case. If a request for a plenary review of his case was made, the appellant was provided an appeal on a complete record of the trial. Petitioner asked his appointed attorney to perfect a plenary appeal and counsel gave notice therefor. However, counsel, apparently believing that the appeal was without merit, failed to file the entire record of petitioner's trial although it had been prepared and although counsel had advised petitioner that he would file same. The Iowa Supreme Court took petitioner's case into consideration

on the clerk's transcript alone, and the conviction was affirmed by that court. On certiorari this Court reversed the decision of the Iowa Supreme Court. Justice Clark, speaking for the Court, said that:

" . . . Here there is no question but that petitioner was precluded from obtaining complete and effective appellate review of his conviction by the operation of the clerk's transcript procedure as provided in Iowa law. Such procedure automatically deprived him of a full record, briefs and arguments on the ~~date~~ election of his appointed counsel, without providing any notice to him or to the reviewing court that he had chosen not to file the complete record of his case. By such action all hope of any [adequate and effective] appeal at all, . . . was taken from the petitioner" (386 U.S. at 752).

From the *Anders* and *Entsminger* cases it is clear that a judgment on the part of appointed appellate counsel that an appeal or a ground for appeal lacks merit should not preclude a convicted defendant from obtaining a review of the grounds which he seeks to raise.

#### C. FACTS IN CASE AT BAR.

In the case at hand Kaufman, after conviction, was sent to New York on an unrelated matter and then to the United States Penitentiary in Atlanta. An attorney was appointed in St. Louis to represent him on appeal. Upon the appointment of his appellate counsel, Kaufman wrote to the attorney from New York and told the attorney that there were several points which should be raised in the appeal, including the issue of whether or not evidence obtained from his

person and his car subsequent to his arrest should have been excluded as evidence at his trial. (See Appendix B of this brief.) The appellate counsel, in his brief and in oral argument which took place on March 9, 1965, did not raise the search and seizure issue, considering it to be without merit. On April 26, 1965 Kaufman wrote a letter to the attorney asking that he raise the search and seizure issue in some way. The appellate attorney then went to the clerk of the United States Court of Appeals for the Eighth Circuit and discussed with the clerk the matter of raising the issue at that time. The clerk advised the attorney that in his opinion there was no formal way to bring the issue before the court at that time. However, he suggested that the attorney send Mr. Kaufman's letter to him requesting that it be brought to the attention of the court. The attorney sent Mr. Kaufman's letter to the court with a cover letter (see Appendices C and D of this brief). The court, in its opinion, which was filed in September, 1965, was silent on the search and seizure issue. The same appellate attorney then filed a petition for writ of certiorari in this Court in which he raised the search and seizure issue.

#### D. CONCLUSION.

Kaufman has been denied appellate review of a point, the illegal search and seizure issue, which he has consistently maintained has merit. He asked both before and after oral argument of the case that this point be raised. His appellate counsel did not raise the point, at least not at that time because his attorney did not believe that the point had any merit. The clerk of the United States Court of Appeals for the Eighth Circuit told appellate counsel that there was no formal way of raising the issue subsequent

to oral argument of the case. This advice was not altogether accurate, for appellate counsel could have raised this point by a supplemental brief or by a motion for re-argument of the case or by some other type of extraordinary motion. The United States Court of Appeals for the Eighth Circuit had the issue before it several months prior to the time they issued their opinion in the case, but in their opinion they were silent on the issue. Thus, Harold Kaufman, through no fault of his own, has been denied review of this issue due to failure of his appellate attorney to raise it in a proper way at the proper time, through inaccurate advice from the clerk of the United States Court of Appeals for the Eighth Circuit, and through failure of the court itself to consider the issue even after it had been raised informally. He has thus been deprived of due process and effective representation by counsel, at least on this one issue.<sup>4</sup> Under these circumstances it cannot be said that he has waived his right or lost his right to a review of this issue, and the means left to him to obtain a review of this issue is through the remedy provided by 28 U.S.C. § 2255.

<sup>4</sup> In all fairness, it should be pointed out appointed appellate counsel did an excellent job in briefing and presenting those points which he did raise in Kaufman's behalf.

## 3.

Evidence Obtained Through a Warrantless Search of Petitioner's Automobile Several Hours After His Arrest for a Traffic Violation, in a Garage Located Some Distance From the Place of Arrest and Some Distance From the Place at Which Petitioner Was Being Detained, Was Not Properly Admitted in Evidence Against Petitioner at His Trial for Robbery of a Savings and Loan Association. Further, Evidence Obtained Through a Search of Petitioner's Person at the Police Station After His Arrest on the Traffic Charge Was Not Properly Admitted Against Him.

#### A. FACTS SURROUNDING THE SEARCH OF THE RAMBLER.

As pointed out in the Statement of the Case and Facts, above, Harold Kaufman was arrested on a traffic charge at about 4:40 P.M., taken to the city police station, and his car was towed away to a garage. At this time Kaufman was suspected of no greater crime than being involved in a "hit and run" accident on the Missouri side of the Mississippi River. The garage owner entered the car and found the pistol which had been used in the robbery. He called the police and he removed the pistol after making his phone call. It is not clear from the facts whether a policeman was present at the time of the removal of the pistol or not.

In the meantime, at the police station, Kaufman was searched by city police. On his person the police found \$352.00 in currency and an auto rental contract showing that the car which he had been driving had been rented to one Arthur Cooper.

The F. B. I. sent agents to Alton to investigate Kaufman in connection with the robbery of the Savings and Loan

Association in Missouri. The only link between Kaufman and the robbery was the fact that, after the time of the robbery, he had driven out of Missouri on a major highway which led across the Mississippi River into Illinois and he had been involved in a hit-and-run accident along the route. One of the F. B. I. agents went to the Alton police station and after 6:30 P.M. was given the money and the auto rental contract which had been taken by the police. At 9:00 o'clock two other F. B. I. agents arrived at the garage and made a thorough, two-hour, search of the car, obtaining further evidence including stolen traveler's checks, a New York City traffic ticket, two receipts for gasoline which had been purchased the day before in Pennsylvania, showing the route which Kaufman had followed in traveling to the St. Louis area, and a receipt showing that he had sent a Western Union money order to his girl friend, a woman in New York City, the day prior to the robbery. Also, there was found in the car during this search a receipt showing the name of the gun shop at which the pistol used in the robbery had been obtained earlier that day.<sup>5</sup> Neither the F. B. I. nor the Alton police had a search warrant for the search of the car or Kaufman's person.

#### B. PRESTON v. UNITED STATES AND OTHER CASES INVOLVING SEARCHES OF AUTOMOBILES LOCATED SOME DISTANCE FROM THE PLACE OF ARREST.

In *Preston v. United States*, 376 U.S. 364 (1964), the petitioner and two others had been arrested for vagrancy while sitting in a parked car late at night. The car was towed to a garage without being searched. In a later search at the garage, made without a warrant, police found two

---

<sup>5</sup> See footnotes 1. and 2., *supra*.

loaded revolvers, women's stockings with mouth and eye holes, and an illegally manufactured license plate designed to be snapped over another license plate. These articles which had been taken from the car were introduced against the defendant at his subsequent trial and he was convicted of robbery of a federally insured bank. On appeal to this Court, the conviction was reversed. The search of the car took place several hours after the occupants had been arrested, the arrest was for a minor, non-dangerous offense, and the search was too remote in time and place to have been incident to the arrest and, therefore, was illegal. Consequently any evidence obtained during such a search was inadmissible under the federal exclusionary rule. The Court, speaking through Mr. Justice Black, said:

"... Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. ... Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had probable cause to think the car was stolen, the police had the right to search the car when they first came on the scene. But this does not decide the question of reasonableness of a search at a later time and at another place. . . ."

See also, *Stoner v. California*, 376 U.S. 483 (1964).

During this last term, this Court decided a case having a factual situation very similar to the facts involved in the *Preston* decision and in the case at bar. The case we refer to is *Dyke v. Taylor Implement Manufacturing Co.*, 36 L.W. 4436 (1968). Defendants were being tried in a state court on a criminal contempt charge. Over their objection the court admitted in evidence an air rifle found by police offi-

cers in defendants' automobile as a result of a warrantless search, after their arrest for a traffic offense, conducted while the defendants were in custody inside the courthouse and their automobile was parked on the street outside. They were convicted of the crime and the Supreme Court of Tennessee affirmed the conviction. On certiorari the decision was reversed on the ground that under the Fourth and Fourteenth Amendments the admission of the air rifle was improper, since the warrantless search was not justifiable as an incident to a lawful arrest. The search of the car was too remote in time and place from the arrest to be considered incident to the arrest.

In the case of *Williams v. United States*, 382 F.2d 50 (5th Cir., 1967), the defendant fled upon being approached by postal inspectors who had been keeping him under surveillance because they suspected him of stealing United States Treasury checks from the mails. His abandoned automobile was impounded by city police, but it was held that this did not authorize postal inspectors to search the automobile without a warrant, since such a search was not incident to any arrest and did not relate to the nature and purpose of the custody of the impounded automobile. The stolen checkbook which was found in the automobile was held to be inadmissible by the United States Court of Appeals for the Fifth Circuit. This case is of importance in the present case because it indicates that, even if it could be found that the Alton city police were justified in searching the automobile driven by Kaufman, the F. B. I. certainly had no right to search the car at the garage in Alton.

There are two other cases which have been decided recently by this Court concerning searches of automobiles not incident to an arrest. The first of these is *Cooper v. California*, 386 U.S. 58 (1967). Cooper was arrested on a

narcotics charge. There was evidence that he had used his car in connection with this offense. A week after the arrest evidence was found in the glove compartment of his car, which had been impounded and held in a garage. California had a forfeiture statute under which the entire car had been forfeited to the state as evidence. The *Preston* case is distinguishable from *Cooper* in that in the *Cooper* case the car was being held under a state forfeiture statute under which the police were to hold the car as evidence. If the state was justified in holding the entire car as evidence it certainly was justified in searching through any part of the car. In *Preston* the police had arrested the petitioner for vagrancy but had held the car because they believed it might have been stolen. The *Cooper* case is clearly distinguishable from the facts in the instant case because we are not here dealing with the forfeiture statute such as that in effect in California. The facts in our case are much closer to those involved in *Preston*.

*Harris v. United States*, 36 L.W. 4195 (1968), involved a District of Columbia police department regulation requiring officers taking an impounded vehicle in charge to inventory the vehicle thoroughly, to remove all valuables from it, and to attach to the vehicle a property tag listing certain information about the circumstances of the impounding. A police officer, acting under the authority of this regulation, found evidence of an automobile registration card belonging to a robbery victim. He discovered this card on the metal stripping under the door of the automobile, while he was taking measures to protect the car under the above-stated regulation. This Court ruled that the finding of this card, under these circumstances, could not be considered the result of a search. This object was found in plain view of the officer during a legitimate inventory of

the car authorized under the police regulation. In the *Kaufman* case there is no mention, in the record, that the Alton police had a regulation such as the regulation involved in *Harris*. And, even if so, we do not know whether Cliff Martin, the operator of the garage where the car was impounded, had authority under this regulation.

### C. THE PISTOL.

The first item taken from the car was the pistol. From the transcript it appears that Martin was a private citizen. The pistol, therefore, might not be subject to the sanction of the exclusionary rule, since the exclusionary rule has been viewed as a restraint upon the activities of sovereign authority and not a limitation upon searches by private individuals, *Burdeau v. McDowell*, 256 U.S. 465 (1961). However, it can be argued that *Burdeau v. McDowell* should no longer be followed and that searches by private individuals should be covered under the exclusionary rule as well as searches by police. The purpose of the exclusionary rule is to deter unlawful invasions of privacy, and the rule is as necessary to protect individuals against invasions of their privacy by private individuals as it is to protect them against such invasions by police. If the gun was obtained illegally it should not have been admitted as evidence against the defendant and, further, if the identity of the gun shop from which the pistol had been purchased was ascertained through the tracing of the serial number on the pistol, the testimony of the operator of the gun shop, John Davis, who testified concerning Kaufman's calmness during the time he was purchasing the gun shortly before the robbery (in rebuttal against Kaufman's insanity defense), would have been excludable from evidence as the fruit of an illegal search and seizure.

It is true that Kaufman's trial attorney did not object to the admission in evidence of the pistol but this was such a harmful piece of evidence against Kaufman that, if it can be shown that the gun was obtained through an illegal search and seizure, the decision by his attorney not to object to its introduction should not be considered binding upon Kaufman. The pistol was a very damaging piece of evidence at the trial. The jury must have been affected by the calmness by which Kaufman had acquired the gun, and the display of the gun in the courtroom. The actual viewing of the gun is a lot different than talking about it in the abstract. It looks much more deadly being held in someone's hand and ■ being talked about than when someone is just talking about a gun. The admission of this gun against Kaufman was extremely prejudicial to Kaufman.

#### D. THE EVIDENCE FOUND ON THE FLOOR BOARD OF THE CAR.

The items found on the "floor board" of the car were found by the F. B. I. through an illegal search and seizure and therefore should not have been admitted in evidence against the defendant. His attorney objected to all of these items except the travelers' checks.<sup>\*</sup> There is one item found in the automobile which was prejudicial to Kaufman although this item was not introduced as evidence against him at his trial. We refer to the receipt showing that he had purchased the pistol at the Wittel Gun Shop in Alton on the same day as the robbery. This receipt may have provided the information which led the police to Mr. John Davis, the operator of the gun shop, who gave very damag-

\* The failure of Kaufman's attorneys to object to the travelers' checks, which were the "fruits" of the crime, may have amounted to less than the effective assistance of counsel, which is required under the Sixth Amendment [see *Powell v. Alabama*, *supra*, and *People v. Ibarra*, 34 Cal. Rptr. 863, 386 P.2d 487 (1963)].

ing testimony against Kaufman at his trial. It will be recalled that Mr. Davis testified that Kaufman had been calm, logical, coherent, and entirely competent shortly before the robbery. This evidence was damaging on the issue of insanity, which was Kaufman's sole defense in his case. Furthermore, the receipts for gasoline and the receipt for a money order sent by Western Union which showed the route that Kaufman had traveled in driving from New York City to the St. Louis area were used by the prosecution on the issue of insanity. As has been pointed out in the Statement of the Case and Facts, *supra*, the prosecution used these bits of evidence to establish that Kaufman had been competent enough and sane enough the day before the robbery to drive all the way from New York City to St. Louis. Kaufman's attorney objected to these pieces of evidence on the ground that they had been obtained through an illegal search and seizure, and his objections should not have been overruled by the trial court.

#### E. THE EVIDENCE TAKEN FROM KAUFMAN'S PERSON AT THE POLICE STATION.

After Kaufman's arrest on a traffic violation he was taken to the police station and was there "searched" by the Alton police. The record does not indicate that this was an inventory of the contents of his clothing but, rather, was a search for the purpose of obtaining evidence. This search was made without a warrant and, of course, it was made some time after the arrest and at some distance from the scene of the arrest on the traffic charge. At this time the police had no probable cause to believe that Kaufman had been involved in the bank robbery. All they had was the request from the Missouri side of the Mississippi River

to arrest a man driving a red Rambler because that man had been involved in a "hit-and-run" accident.

Under these circumstances the search of Kaufman's clothing on his person was unreasonable and the evidence obtained in this search, namely, the auto rental contract showing that the car he had been driving was rented to Arthur Cooper and the currency, the proceeds of the bank robbery, should not have been admitted in evidence against him. As was said in the case of *James v. Louisiana*, 382 U.S. 36 (1965), a search can be valid if it is based on a valid search warrant or if it is "incident to an arrest." However, a search can only be incident to an arrest if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. Once an accused is under arrest and in custody, a search made at another place, without a warrant, is simply not incident to the arrest and the fruits of such a search cannot be admitted as evidence against the defendant.

In the case at bar, Kaufman was under arrest for a traffic charge, and at the time of the search was some distance away from the place of arrest. Therefore the evidence obtained from his person should not have been introduced in evidence against him. It should be pointed out that the admissions of these items of evidence were objected to at the trial by the defendant's attorney.

#### F. DEFENDANT KAUFMAN HAD STANDING TO OBJECT TO THE ADMISSION, AT THE TRIAL, OF ITEMS TAKEN FROM HIS CAR AND HIS PERSON.

In *Jones v. United States*, 362 U.S. 257 (1960), this Court held that, at least in the case in which the defendant is being tried for possession of narcotics, he does not need

to admit that he owned or was in possession of narcotics in order to gain standing to suppress, as evidence, the illegal narcotics. Of course that decision involved a factual situation unlike the situation in the case at hand, but it does indicate the need for and trend toward relaxing the older, strict standing requirements in search and seizure cases.

In the case of *Simmons v. United States*, 36 L.W. 4227 (1968), this Court, speaking through Mr. Justice Harlan, stated that standing requirements have been relaxed in two alternative ways in the *Jones* case:

"... First, we held that when, as in *Jones*, possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence. Second, we held alternatively that the defendant need have no possessory interest in the searched premises in order to have standing; it is sufficient that he be legitimately on those premises when the search occurs. . . ."

It would seem that, based on the above statement, since Kaufman was in possession of the car which he had been driving and since that possession was legitimate, he had standing at the trial to object to the evidence obtained from the car. The Rambler had been rented in New York by a friend of Kaufman's named Arthur Cooper. Cooper rented the car for the sole purpose of allowing Kaufman to use it, and upon renting the car in his name he turned the car over to Kaufman. Kaufman sent a money order for \$50.00 by Western Union telegraph from Pennsylvania to New York to his girl friend, Mrs. Patricia Scott, on Sunday,

the day before the robbery. At the same time he telephoned her and asked her to cash the \$50.00 with Cooper and to give Cooper \$30.00 of the cash for the purpose of extending the time period of the lease on the car.<sup>1</sup> Thus Kaufman was using the car with the complete consent of the person who had legitimately leased it.

In 1955 California adopted the exclusionary rule and shortly thereafter the Supreme Court of California dealt with the standing requirement in the case of *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855 (1955). Justice Traynor, speaking for the court, indicated that since the purpose of the exclusionary rule was to prevent unlawful police activity, any procedure which facilitates these illegal practices should therefore be prohibited. He stated that: "Since all of the reasons which compel us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights. . . ." (290 P.2d at 857). As was mentioned in the *Simmons* case, *supra*, in footnote 12 of the opinion, it can be argued that the "police deterrent" rationale for the exclusionary rule logi-

---

<sup>1</sup> This information is corroborated by the affidavit of Patricia Scott (A. 15, 16), in which she stated:

" . . . I, together with Arthur Cooper, on or about December 14, 1963, cashed a Western Union money order to pay for the rental of the red Rambler automobile used by Harold Kaufman; and further, Arthur Cooper authorized Harold Kaufman to use the aforesaid automobile that he was driving at the time he was apprehended for the holdup of the Roosevelt Fédéral Savings and Loan Association on December 16, 1963; . . . "

The information was also corroborated during a telephone conversation between undersigned counsel Jacob and petitioner Kaufman, on August 1, 1968.

cally dictates that defendant should be able to object to the admission against him of any unconstitutionally seized evidence.

Certainly Kaufman in the instant case had control of the Rambler, at the time he was arrested, and he had a sufficient interest in everything seized within the car to object to its introduction into evidence against him. The United States Court of Appeals for the Tenth Circuit, in *Weed v. United States*, 340 F.2d 827 (10th Cir., 1965), found that a defendant did have standing to object to evidence obtained from a rented automobile which the defendant possessed, apparently lawfully. Based on this case and the above cases, it is clear that Kaufman had standing to suppress or object to the introduction of the evidence which was obtained from the car which he had been driving at the time of his arrest.

#### G. FAILURE OF KAUFMAN'S ATTORNEY TO MAKE A PRE-TRIAL MOTION TO SUPPRESS DID NOT PRECLUDE HIM FROM RAISING HIS OBJECTIONS AT THE TRIAL.

It is clear that the failure of the attorney representing Kaufman at his trial to make a pre-trial motion to suppress evidence which had been obtained through an illegal search and seizure did not preclude him from raising objections to the admission of the evidence at the trial. See *Gilbert v. U.S.*, 307 F.2d 322 (9th Cir., 1962); *Wrightson v. United States*, 95 U.S.App. D.C. 390, 222 F.2d 556 (1955); and *Ganci v. United States*, 287 F. 60 (2d Cir., 1923), *cert. den.* 262 U.S. 755 (1923). It should be pointed out that Rule 41(e) of the Federal Rules of Criminal Procedure provides that although a motion to suppress should ordinarily be made before trial, the court in its discretion may entertain the motion at the trial or hearing.

It should be pointed out that in the case at bar the trial judge in denying defense counsel's objections to evidence which had been obtained through an illegal search and seizure did not base his rulings denying those objections on the fact that a pre-trial motion to suppress had not been made; rather, he apparently made his rulings on the merits of each respective objection or motion to exclude.

#### H. THE INTRODUCTION OF ILLEGALLY OBTAINED EVIDENCE AGAINST KAUFMAN WAS HIGHLY PREJUDICIAL AND DAMAGING TO HIS INSANITY DEFENSE.

In *Fahy v. Connecticut*, 375 U.S. 85 (1963), this Court said that in a search and seizure case, the question of whether or not the illegally seized evidence constituted harmless error or not is to be decided by asking the question whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Chapman v. California* case, 386 U.S. 18 (1967), involved the question of whether or not it was harmless error for the prosecuting attorney to comment on the failure of the defendant to testify. It was decided that before an error involving a denial of a federal constitutional right can be held to be harmless error in a state criminal case, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction.

Under these tests it cannot be said that the introduction of evidence illegally obtained from Kaufman's car and his person was harmless error relative to his defense of insanity, since evidence was introduced to show that he was calm, coherent, logical, etc. shortly before the robbery (testimony of John Davis) and to show that he was com-

petent and sane enough to drive from New York to St. Louis the day preceding the robbery, send a telegram, etc. (Govt. Exs. 9-12).

In the trial of Kaufman's case there were two issues: (1) the question of whether or not he was the man who held up the Savings and Loan Association with a pistol; and (2). whether or not he was insane at the time he held up the Savings and Loan. Kaufman and his attorney conceded the first issue. This left only the issue of insanity to be determined by the jury. It is true, therefore, that the evidence which was introduced against Kaufman, the evidence which was illegally taken from the car and from Kaufman's person, could not have harmed Kaufman on the issue of whether or not he was the man who entered the Savings and Loan and used a pistol to obtain traveler's checks and currency. However, as has been shown throughout this brief, some of the illegally seized evidence was used against Kaufman specifically on the issue of insanity and we submit that it cannot be shown beyond a reasonable doubt that this evidence did not contribute to the finding of the jury that Kaufman was sane at the time of the incident, and there exists at least a reasonable possibility that the evidence complained of might have contributed to the conviction. Also the fruits of the crime (the money and travelers' checks) and the pistol certainly had a prejudicial effect against Kaufman on the controverted issue of insanity.

### Conclusion

Undersigned counsel submit that the United States District Court for the Eastern District of Missouri, in its order dated March 16, 1967, was in error in failing to fully consider petitioner Kaufman's claims that he had been convicted on the basis of evidence obtained through an unlawful search and seizure. Likewise, the United States Court of Appeals for the Eighth Circuit was in error in denying petitioner's motion for leave to appeal *in forma pauperis*. It is requested: (1) that petitioner's present conviction for robbery of a federally insured savings and loan association be vacated and that he be granted a new trial; or (2) that the judgment of the United States Court of Appeals for the Eighth Circuit, and that of the United States District Court for the Eastern District of Missouri, dated March 16, 1967, be vacated and the cause remanded for a full consideration of the illegal search and seizure issues discussed in this brief.

Respectfully submitted,

BRUCE R. JACOB

WILLIAM F. C. SKINNER, JR.

Legal Assistance for Inmates Program

Emory University School of Law

Atlanta, Georgia 30322

Attorneys for Petitioner

(Assisted in the preparation of this brief by Attorney Thomas E. Baynes, Jr. and law students Fred W. Ajax, William C. Turner, William R. Rapoport, Charles R. Holman, Jr., William J. Terry and Dennis J. Lanahan, Jr.)

**CERTIFICATE OF SERVICE**

I, Bruce R. Jacob, certify that on the ..... day of August, 1968, I served copies of the foregoing brief, upon Miss Bertrice Rosenberg, Criminal Division, Department of Justice, Washington, D.C.

---

## APPENDIX A

### Constitutional and Statutory Provisions Involved

#### Article I, Section 3, Clause 1 of the Constitution.

"The privilege of the Writ of Habeas Corpus shall not be suspended."

#### Fourth Amendment to the Constitution.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

#### APPENDICES

#### Fifth Amendment to the Constitution.

"... [A]nor I shall any person] be deprived of life, liberty, or property, without due process of law;

#### Sixth Amendment to the Constitution.

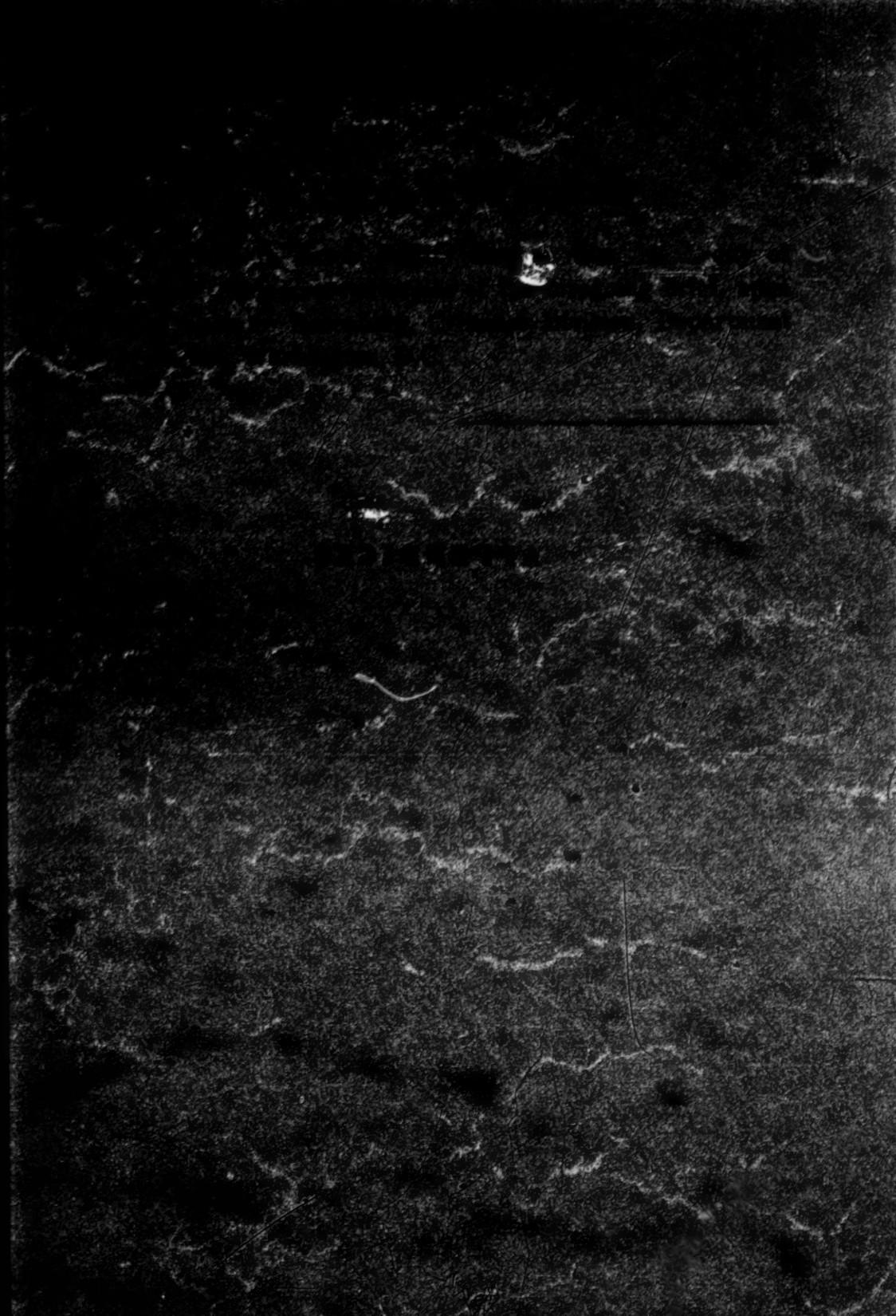
"In all criminal prosecutions, the accused shall have the Assistance of Counsel for his defense."

#### 28 U. S. C. § 2241.

"(a) Writs of habeas corpus may be granted by the Supreme Court, any Justice thereof, the Circuit Courts and any circuit judge within their respective jurisdictions.

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by virtue of the authority of the United States or if committed for trial before some court thereof, or



## **APPENDIX A**

## **Constitutional and Statutory Provisions Involved**

1. Article I, Section 9, Clause 2 of the Constitution:  
"The Privilege of the Writ of Habeas Corpus shall not be suspended, . . .".
  2. Fourth Amendment to the Constitution:  
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
  3. Fifth Amendment to the Constitution:  
". . . [N]or [shall any person] be deprived of life, liberty, or property, without due process of law; . . ."
  4. Sixth Amendment to the Constitution:  
"In all criminal prosecutions the accused shall . . . have the Assistance of Counsel for his defense."
  5. 28 U. S. C. § 2241:  
"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .  
• • • • •  
(c) The writ of habeas corpus shall not extend to a prisoner unless—  
(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;

\* \* \* \* \*

6. 28 U. S. C. § 2255:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

**APPENDIX B****Affidavit of Harold Kaufman**

STATE OF INDIANA )  
COUNTY OF VIGO )

I, Harold Kaufman, being first duly sworn, hereby de-  
pose and say:

1. I am presently an inmate of the United States Peni-  
tentiary, Terre Haute, Indiana. I am the petitioner in the  
case of *Kaufman v. United States* previously No. 1281,  
Oct. Term 1967, now No. 53, Oct. Term, 1968, presently  
pending before the Supreme Court of the United States.

2. In 1964 I was convicted in the United States District  
Court for the Eastern District of Missouri of the crime of  
robbery of a federally insured savings and loan associa-  
tion. In 1964 and 1965 I took a direct appeal from this  
conviction to the United States Court of Appeals for the  
Eighth Circuit. An attorney named Walter E. Diggs, Jr.  
~~of St. Louis, Missouri~~ was appointed by that Court to  
represent me in the appeal.

3. I have never seen Mr. Diggs and I have never spoken  
to him, either in person or by telephone. All contact be-  
tween us during my direct appeal to the Eighth Circuit  
was through correspondence.

4. At the time Mr. Diggs was appointed to represent  
me in my direct appeal and until about March, 1965, I was  
confined on an unrelated matter in the Federal House of  
Detention in New York City.

5. Upon the appointment of Mr. Diggs I wrote to him  
from New York and to the best of my memory, I told him  
that there were several points which should be raised in

the appeal, including the issue of whether evidence obtained from my person and my car subsequent to my arrest should have been excluded as evidence at my trial.

6. I was transferred from New York to the United States Penitentiary in Atlanta in about March of 1965. I do not recall exactly when I received a copy of Mr. Diggs' brief, in my case, but, to the best of my knowledge, I did not receive a copy until after I arrived at Atlanta. On April 26, 1965, I wrote to Mr. Diggs, asking him to raise the illegal search and seizure issue before the Eighth Circuit in my behalf.

/s/ HAROLD KAUFMANN  
Harold Kaufman

(Jurat omitted in printing)

**APPENDIX C****Affidavit of Walter E. Diggs, Jr.**

STATE OF MISSOURI )  
COUNTY OF ST. LOUIS )

I, Walter E. Diggs, Jr., being first duly sworn, hereby depose and say:

1. I am an attorney, engaged in the practice of law in St. Louis, Missouri.
2. I was the court-appointed attorney who, in 1965, represented Harold Kaufman before United States Court of Appeals for the Eighth Circuit in the direct appeal from his conviction in the Eastern District of Missouri of the crime of robbery of a federally insured savings and loan association.
3. I made my oral argument to the court in the above appeal on March 9, 1965. Following my oral argument in the case Mr. Kaufman, by letter to me dated April 26, 1965, raised the issue of illegal search and seizure. In his letter he cited several cases to me in support of his arguments. I had not raised the issue before the court, by brief or by oral argument, considering it to be of little merit. After carefully reading the cases cited to me in Kaufman's letter of April 26, I was still of the opinion that the illegal search and seizure issue was without merit. However, I determined to take every precaution to follow his desires, and accordingly, went to the court and discussed with the clerk the matter of raising the issue of illegal search and seizure at that time. Mr. Tucker, the Clerk of the Court, informed me that in his opinion there was no formal way to bring

the issue of illegal search and seizure before the court at that time. However, he suggested that I send Mr. Kaufman's letter to him, requesting that it be brought to the attention of the judge who had heard my argument. I followed his advice, sending Mr. Kaufman's letter to Mr. Tucker on June 17, 1965.

/s/ WALTER E. DIGGS, JR.  
Walter E. Diggs, Jr.

(Jurat omitted in printing)

**APPENDIX D**

1. Letter from Robert Tucker to Bruce Jacob,  
June 17, 1968

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

St. Louis, Mo. 63101

ROBERT C. TUCKER, Clerk

June 17, 1968

Mr. Bruce R. Jacob  
Assistant Professor of Law  
Emory University  
Atlanta, Georgia 30322

Re: No. 17834. Harold Kaufman v. United States of America.

Dear Sir:

... I have examined the file and can state to you that I received a letter from Mr. Diggs dated June 17, 1965, with which he enclosed 3 letters received from Harold Kaufman, one of which was undated and the others being dated March 18, 1965, and April 26, 1965. I sent all of those letters to the panel to whom the case was assigned for opinion and do not have them any more. In his letter of June 17, Mr. Diggs stated . . . 'you will notice that in his letter of April 26, 1965, that he has cited the case of

Preston v. United States, which he contends indicates that there was a blatant violation of his constitutional rights in the search of his automobile following the armed robbery on which he was convicted."

• • • • •  
Very truly yours,

/s/ ROBERT C. TUCKER  
Robert C. Tucker

2. Letter from Robert C. Tucker to Bruce R. Jacob,  
July 12, 1968

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT  
St. Louis, Mo. 63101

July 12, 1968

Mr. Bruce R. Jacob  
Assistant Professor  
Legal Assistant for Inmates Program  
Emory University School of Law  
Atlanta, Georgia 30322

Re: No. 17834. Harold Kaufman v.  
United States of America.

Dear Sir:

After writing you on June 17, 1968, I instituted inquiries among members of the Court concerning the correspondence referred to in my letter. I now think that I have reassembled all of the correspondence in this case and I enclose to you herewith copies of the following:

1. Mr. Diggs' letter of June 17, 1965, with which he enclosed letters from the appellant dated March 18, 1965, April 26, 1965, and one undated.

Very truly yours,

Robert C. Tucker,  
Clerk

3. Letter from Walter E. Diggs, Jr., to Robert C. Tucker,  
June 17, 1965

(Letterhead of Grand, Peper and Martin, Attorneys  
at Law, St. Louis, Missouri 63101)

June 17, 1965

Mr. Robert C. Tucker, Clerk  
United States Court of Appeals  
for the Eighth Circuit  
United States Court & Custom House  
12th & Market Streets  
St. Louis, Missouri 63101

Re: No. 17834—Harold Kaufman  
vs. United States

Dear Mr. Tucker:

I enclose herewith letters which I have received from Mr. Kaufman since I argued the above captioned cause on March 9, 1965. You will notice that in his letter of April 26, 1965 that he has cited the case of Preston vs. United States, which he contends indicates that there was a blatant violation of his constitutional rights in the search of his automobile following the armed robbery on which he was convicted.

I have written to Mr. Kaufman indicating that I have forwarded his letters to the court.

Very truly yours,

/s/ WALTER E. DIGGS, JR.  
Walter E. Diggs, Jr.

4. Letter from Harold Kaufman to his court-appointed appellate attorney, April 26, 1965.

*From:* Harold Kaufman                   April 26, 1965  
88176

*To:* Mr. Walter Diggs, Jr.               407 N. Eighth Street  
St. Louis, Missouri

Dear Mr. Diggs:

As we should be hearing from the Court of Appeals any day now, I have discovered a very serious and prejudicial [sic] error in the trial. I have also found the leading and most recent Supreme Court decision on this. I feel if nothing else this could guarantee a new trial.

Now as you will see in pages 61-110 of the transcript, there were timely and many objections to the introduction of evidence that were [sic] taken from the car. Also the money that was taken from my coat, that I was no longer wearing. The main and pertinent part is that I was arrested at 4:00 P.M. in one a [sic] place the car was seized and taken to a garage under police custody and searched at 6:00 to 8:00 P.M. without a search warrant by the F.B.I. and the local police. *Preston v. U.S.*, U.S. Supr. 305 F.2d 172, certiorary [sic] granted 373 U.S. 931 adjudicated on March 23, 1964. I am certain as you read this case, and read the transcript you will come to the conclusion this was a blatant violation of my Constitutional rights in the search of the car. Further I don't remember the case, but I think it was *Escobedo v. Ill.* the fruit of

the poisonous [sic] tree. The evidence from the car was used to produce witnesses and cross examine Pat.

The problem how [sic] can we make it timely again? I leave this to you.

I have nothing but time to research; so please don't feel the fact that I found this error reflects on you in any way, you did one hell of a job.

I am enclosing the transcript with this letter, and please let me know if we can still do anything if we are denied in the Appeal Court.

Respectfully and gratefully,

Harold Kaufman 88176  
Box P.M.B.

P.S. Send the transcript back when you are done, no rush. Also, as you read the case and the transcript, the fact that we judiconaly [sic] admitted the crime does not in any respect give up any constitutional rights. Perhaps this might be grounds for reargument if I am denied the appeal. I leave the remedy to you all [sic] I ask is that you please realize I want to gamble on a new trial. I have nothing to lose and everything to gain.